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EICHELBAUM *v.* KLAFF.

June 12, 1919.

[99 S. E. 721.]

1. **Appeal and Error (§ 1002*)—Verdict—Conclusiveness.**—Finding of jury on conflicting evidence is conclusive on appeal.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 621.]

2. **Sales (§ 81 (1*))—Delivery of Goods—Time as Essence of Contract.**—In contracts for delivery of goods, time is not generally of the essence of the contract.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 24.]

3. **Sales (§ 176 (1*))—Time for Delivery—"Waiver."**—Where a contract makes delivery by certain date imperative, the buyer may waive it expressly either in writing or by parol, and impliedly, by inconsistent conduct; a "waiver" occurring where one possessing any right under law or contract, with full knowledge of material facts, does or forbears the doing of something inconsistent with existence of right or of his intention to rely upon it, precluding him from thereafter claiming anything by reason of it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Waiver. For other cases, see 12 Va.-W. Va. Enc. Dig. 39; 13 Va.-W. Va. Enc. Dig. 637.]

Error to Corporation Court of Danville.

Action by M. Eichelbaum against N. Klaff. Judgment for defendant, and plaintiff brings error. Affirmed.

A. S. Hester, of Lynchburg, for plaintiff in error.

Harris & Harvey, of Danville, for defendant in error.

VIRGINIA-WESTERN POWER CO. *v.* COMMONWEALTH *ex rel.* CITY OF CLIFTON FORGE *et al.*

June 12, 1919.

[99 S. E. 723.]

1. **Constitutional. Law (§ 135*)—Impairment of Obligation of Contracts—What Is.**—Where municipalities at the time of granting a franchise were vested with unlimited authority to contract with the grantee on the subject of fixing rates which might be charged for services rendered the public during the whole of the franchise period, held, that the rates fixed in the franchise contract are irrevocable under U. S. Const. art. 1, § 10, preventing states from passing any law impairing the obligation of contracts.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 216; 5 Va.-W. Va. Enc. Dig. 53.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

2. Electricity (§ 11*)—Regulation of Charges—Police Power.—

The power to fix and regulate charges for a public service such as the service rendered by electric companies is a police power.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 175.]

3. Electricity (§ 11*)—Charges—Police Power—Franchise.—A franchise contract made between a municipality and a quasi public corporation fixing irrevocably the rates for the period covered by the franchise, when made with the authority of the state, extinguishes pro tanto the power of the state to fix rates.

4. Electricity (§ 11*)—Rates—Franchises—Powers.—Under Const. §§ 124, 125, and in view of Code 1904, §§ 1033d, 1033e, and 1033f, in view of Const. §§ 156(b), 156(d), which, however, do not of their own force give municipalities authority to fix irrevocably the rates to be charged by a quasi public corporation, a municipality or an electric light company has power to irrevocably fix in the franchise rates to be charged.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 184.]

5. Electricity (§ 11*)—Rates—Franchises—Revocation.—Where the state Constitution gave municipalities irrevocable power to fix by franchise contract the rates to be charged by quasi public corporations, as electric light companies, the state has the power to revoke the authority granted, but such revocation can affect only the validity of future actions of municipalities, and does not affect a franchise contract already made.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 185.]

6. Electricity (§ 11*)—Rates—Franchise Contracts with City.—Where a municipality, as a condition to granting a franchise, contracts as to the rates to be charged by an electric light company, it is acting in its business and not in its governmental capacity.

7. Municipal Corporations (§ 285*)—Franchise Contracts—Construction.—Municipal authority to make contracts to include a franchise to an electric light company and a contract irrevocably fixing rates during the franchise period must be conferred by constitutional or legislative authority.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 182.]

8. Electricity (§ 11*)—Franchise Contracts—Rates—Irrevocable Contracts.—As Const. § 125, must be construed with section 164, held, that the latter section, providing that the right of regulation and control of public service corporations shall never be surrendered or abridged, did not prohibit municipal corporations from making irrevocable contracts as to rates on the condition of granting a franchise to public service corporations as electric light companies, and hence Corporation Commission, under Act 1914, p. 673, has no au-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

thority to change without consent of such municipalities rates so fixed.

Appeal from State Corporation Commission.

Complaint by the Commonwealth of Virginia, on the relation of the City of Clifton Forge, against the Virginia-Western Power Company. From an order of the State Corporation Commission defendant appeals, the case being consolidated with appeals by the same defendant from other orders entered by the Corporation Commission on complaints by the Commonwealth of Virginia, on relation of the City of Buena Vista, of the Town of Covington, and of the Town of Lexington against the same defendant. Orders affirmed.

F. W. King, of Clifton Forge, and *J. M. Perry*, of Staunton, for appellant.

O. B. Harvey and *John W. Bear*, both of Clifton Forge, for appellee city of Clifton Forge.

H. S. Rucker, of Buena Vista, for appellee city of Buena Vista.

R. C. Stokes, of Covington, for appellee town of Covington.

Frank Moore and *O. C. Jackson*, both of Lexington, for appellee town of Lexington.

SHUMAKER'S ADM'X *v.* ATLANTIC COAST LINE R. CO.

June 12, 1919.

[99 S. E. 739.]

1. Pleading (§ 369 (3)*)—Motions—Proceedings under Federal or State Statutes—Right to Require Election.—In an action by an administratrix to recover for decedent's death by being struck by a cut of cars while repairing defendant's locomotive, where the declaration did not clearly indicate whether decedent was engaged in interstate or intrastate commerce at the time of the injury, defendant could not require plaintiff to elect whether to proceed under the federal or state statute, although it might require her to state the facts in such a way that a court could apply the appropriate statute.

2. Pleading (§ 6*)—Matters of Law—Judicial Notice.—It is never necessary to plead any matter of law of which the court will take judicial notice, it being the function of pleading to state facts and not law.

[Ed. Note.—For other cases, see 8 Va.-W. Va. Enc. Dig. 631; 11 Va.-W. Va. Enc. Dig. 218.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.